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No. 99-5716

In the Supreme Court of the United States

FLOYD J. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether bank larceny, 18 U.S.C. 2113(b) (Supp. IV 1998), is a lesser included offense of bank robbery, 18 U.S.C. 2113(a).

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OPINION BELOW

The opinion of the court of appeals (J.A. 80-87) is unpublished, but the judgment is noted at 185 F.3d 863 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1999. The petition for a writ of certiorari was filed on August 12, 1999, and granted on December 13, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of bank robbery, in violation of

18 U.S.C. 2113(a). He was sentenced to 215 months' imprisonment to be followed by three years' supervised release. The court of appeals affirmed. J.A. 80-87.[1]

1. On September 9, 1997, at approximately 2:00 p.m., petitioner entered the Collective Federal Savings Bank in Hamilton Township, New Jersey, through the door adjacent to the parking lot. Despite the warm weather, he was wearing several layers of clothing and a ski mask that covered almost his entire face. Encountering a customer who was leaving the bank, he pushed her twice, and ordered her to "move over." C.A. App. 31. She "attempted to exit around [petitioner], but [he] pushed her back inside." J.A. 81. The customer "was so terrified that she screamed, startling others within the bank." J.A. 82; see also C.A. App. 29-32.

Petitioner then ran toward the customer service counter and vaulted over the counter and through one of the teller windows to the area behind the counter. One of the tellers ran to the branch manager's office, "yelling that a robber was after her." J.A. 82. Petitioner seized money from a teller drawer and stuffed it into a brown paper bag. He then moved to within two feet of where two tellers stood and emptied their teller drawers. *Ibid.* According to one of the tellers, he said he "wouldn't hurt nobody." C.A. App. 79. Nevertheless, two of the tellers testified that they were "scared to death," and one was crying and trembling. Gov't

[1] Petitioner previously had pleaded guilty to an indictment charging three counts of bank larceny, in violation of 28 U.S.C. 2113(b) (Supp. IV 1998), in the United States District Court for the Eastern District of Pennsylvania. The case was transferred, pursuant to Federal Rule of Criminal Procedure 20, to the District of New Jersey for sentencing. He was sentenced on those convictions to a concurrent term of 120 months' imprisonment. J.A. 64-70.

C.A. Br. 3. The customer whom petitioner had pushed inside the bank upon his arrival meanwhile had run out of the bank, "got into her car, laid down on the floor and prayed until the authorities arrived." J.A. 82. After removing almost $16,000 in currency, petitioner hurdled back over the teller counter and warned the bank's occupants not to follow him. Police arrested him shortly thereafter. During a subsequent interview, petitioner confessed that he had taken money from the bank. *Ibid.*

Petitioner's defense was that he committed only bank larceny, not bank robbery. He sought to show through his own testimony and cross-examination of the government's witnesses that he did not use intimidation to obtain the bank's money. He challenged the customer's testimony that she had screamed upon encountering petitioner and that he twice had pushed her. C.A. App. 157-158. According to his account, he wore the ski mask to conceal his identity and was under the mistaken belief that no customers were in the bank when he entered it. *Id.* at 155-156. He said that he specifically avoided confronting the tellers and first approached a vacant teller station because he did not want to scare the tellers. *Id.* at 159-160. He reassured the tellers that he was "not gonna hurt anybody" and just wanted the money. *Id.* at 161. Finally, after stealing the money, he told the occupants not to follow him because "I run fast." *Id.* at 164.

After the close of the government's case, petitioner moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. J.A. 17-20. That motion followed a written submission by defendant requesting that the jury be instructed on a charge of bank larceny as a lesser included offense of bank robbery. J.A. 4-9. The gravamen of both motions was the defense's theory that the government had not

proved that petitioner had obtained the bank's money through "force, violence or intimidation," as required by 18 U.S.C. 2113(a). J.A. 24. The court denied the motion, finding sufficient evidence to establish the elements of bank robbery. J.A. at 23-32. The court also discussed the Third Circuit's decision in *United States* v. *Mosley*, 126 F.3d 200 (1997), cert. granted, 523 U.S. 1019, cert. dismissed, 525 U.S. 120 (1998), which held, as a matter of law, that bank larceny is not a lesser-included offense of bank robbery. J.A. 29-32. Relying on *Mosley*, the court denied petitioner's request for a jury instruction on bank larceny, concluding that the government had introduced sufficient evidence that "the behavior of [petitioner] was such as could put a reasonable person in fear of bodily harm and that that could amount to force or intimidation such as to satisfy the third element of the bank robbery offense." J.A. 32.

The district court accordingly charged the jury that the elements of the offense of bank robbery are (1) that the defendant knowingly and willfully took money from or in the presence of employees of the bank; (2) that the money was in the "care, custody, control, management or possession" of the bank; (3) that the defendant took the money by means of "force, violence or intimidation"; and (4) that the money was insured by the Federal Deposit Insurance Corporation. J.A. 55. The court also instructed the jury that "[t]he defense theory of the case" was that "no conduct of the defendant was reasonably calculated to instill fear of bodily harm." J.A. 57.

2. The court of appeals affirmed. Following *Mosley*, the court held that petitioner was not entitled to a bank larceny instruction because bank larceny is not a lesser-included offense of bank robbery. It emphasized that its holding in *Mosley* was a legal one, resting "solely on the legal interpretation of Sections 2113(a) and (b)."

J.A. 84. It declined to reconsider its decision in *Mosley*, finding that specific intent, while an essential element of a violation of Section 2113(b), is not a requisite element of bank robbery. The court also rejected petitioner's claim that the evidence did not sufficiently establish that petitioner used force, violence, or intimidation to steal the money, which had been the basis of petitioner's motion for acquittal under Federal Rule of Criminal Procedure 29. J.A. 86-87.

SUMMARY OF ARGUMENT

I. Bank larceny is not a lesser included offense of bank robbery.

A. Under *Schmuck* v. *United States*, 489 U.S. 705 (1989), the resolution of the lesser included offense issue turns on whether all of the statutory elements of the putative lesser offense are necessarily established by proving the charged offense. Bank larceny contains elements not found in bank robbery. Section 2113(b) bank larceny requires the government to prove that the defendant (1) had the specific "intent to steal or purloin" the bank's property; (2) "carrie[d] away" that property; and (3) took property that had a monetary value. 18 U.S.C. 2113(b) (Supp. IV 1998). Section 2113(a) bank robbery contains none of those requirements. 18 U.S.C. 2113(a).

The omission of a specific intent requirement in the first paragraph of Section 2113(a) is significant. Congress provided specific intent elements in other subsections of Section 2113. For example, the bank burglary offense set forth in the second paragraph of Section 2113(a) requires an "intent to commit in such bank * * * any felony affecting such bank." The presumption is that the omission of a counterpart specific intent element for bank robbery was deliberate.

See *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997). That conclusion is further supported by the absence of a specific intent to steal requirement in other robbery offenses defined in the criminal code, such as 18 U.S.C. 1951 (Hobbs Act), 18 U.S.C. 2111 (robbery in the special maritime and territorial jurisdiction of the United States), 18 U.S.C. 2118(a) (robbery of controlled substances), and 18 U.S.C. 2119 (Supp. IV 1998) (carjacking).

Although Section 2113(a) bank robbery does not contain an express mental element, it is appropriate to infer a general intent requirement. The courts of appeals have consistently held that the defendant must act "knowingly" with respect to each *actus reus* in Section 2113(a). The conclusion that the knowing use of "force and violence, or by intimidation" is a sufficient mental element accords with the purposes behind Congress's enactment of the bank robbery offense. Because of the threat posed to innocent persons in financial institutions, bank robbery causes as much social harm and is just as serious even if the perpetrator lacks a specific intent to deprive the bank permanently of its property.

For similar reasons, the omission of an asportation element and a monetary valuation requirement in Section 2113(a) bank robbery further supports the conclusion that Congress did not intend bank larceny in Section 2113(b) to be a lesser included offense of bank robbery.

B. The legislative history does not support petitioner's submission. Although simple larceny was a lesser included offense of robbery at common law, an examination of the language and background of Section 2113 refutes the contention that Congress intended merely to codify the common law robbery and larceny

offenses. Congress did not initially enact a bank larceny offense when it proscribed bank robbery in 1934. When it later added a crime for bank larceny, it did so to fill a gap in the statute—the failure to reach the theft of bank property without the use of force, violence, or intimidation. Congress did not indicate in 1937 that it intended bank larceny to be a lesser included offense of the bank robbery crime established in 1934. And as this Court has already recognized, the language of Section 2113 creates a larceny offense that is broader than the common law. See *Bell* v. *United States*, 462 U.S. 356, 360-361 (1983). The same is true of the robbery offense defined in Section 2113.

C. Nor do this Court's cases and canons of statutory construction support petitioner's contention. In *Prince* v. *United States*, 352 U.S. 322 (1957), this Court held that convictions under paragraphs one and two of Section 2113(a) merge if the defendant actually completed the crime of bank robbery. That holding did not entail an analysis of the statutory elements of the offenses contained in Sections 2113(a) and (b), as is now required by *Schmuck*, *supra*. The holding in *Prince* may bar certain cumulative punishments under Section 2113 (a result achieved today by the Sentencing Guidelines), but it does not compel the giving of a lesser included offense instruction when the government charges only bank robbery (and not bank larceny) in the indictment.

Similarly, petitioner's reliance on *Morissette* v. *United States*, 342 U.S. 246 (1952), is misplaced. *Morissette* construed the theft offenses in 18 U.S.C. 641 to incorporate common law requirements. That conclusion does not carry over to Section 2113, which departs from the common law. Nor is petitioner assisted by *Neder* v. *United States*, 527 U.S. 1 (1999). That case

construed federal fraud statutes to incorporate the common law requirement of materiality. In contrast to Congress's undefined references to a "scheme to defraud" in those statutes, the bank robbery statute specifies its elements and now omits from its text an intent-to-steal element that was previously present (in the form of the word "feloniously"). It is one thing to hold that a simple reference to a common law crime carries with it the common law's elements; it is quite another to hold that Congress cannot escape the common law even when it enumerates the elements of a crime and deliberately omits some aspects of that crime's common law antecedents.

II. Even if, contrary to our submission, this Court were to hold that the statutory elements of Section 2113(b) create a lesser included offense of Section 2113(a) bank robbery, the district court correctly declined to give a lesser included offense instruction in this case. Federal Rule of Criminal Procedure 31(c) requires such an instruction only if the evidence would permit a rational jury to convict the defendant of the lesser offense while acquitting him of the greater one. The district court here properly concluded that the evidence admitted of only one conclusion: that petitioner obtained the bank's money by the use of intimidation. There is no evidence that petitioner obtained the funds as a result of the tellers' voluntary actions. Because no rational juror could reach the conclusion advanced by petitioner, a bank larceny instruction was not required.

ARGUMENT

I. BANK LARCENY IS NOT A LESSER INCLUDED OFFENSE OF BANK ROBBERY

Federal Rule of Criminal Procedure 31(c) provides that a "defendant may be found guilty of an offense necessarily included in the offense charged." In *Schmuck* v. *United States*, 489 U.S. 705 (1989), the Court held that, for purposes of instructing the jury, the test for determining whether one offense is a "necessarily included" offense of another under Rule 31(c) is the statutory "elements" test. Under that test:

> [O]ne offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

489 U.S. at 716. See *Hopkins* v. *Reeves*, 524 U.S. 88, 96 & n.6 (1998).[2]

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[2] Although petitioner acknowledges that *Schmuck* requires analysis of the textual elements of the putatively greater and lesser offenses, he maintains that *Schmuck* does not require "a mechanical literalism" of examining whether the words defining the elements in the two provisions are the same. Pet. Br. 10. Petitioner's approach, however, is inconsistent with how this Court analyzed textual elements in cases addressing whether one offense is necessarily included within another. See *Schmuck*, 489 U.S. at 721-722 ("[K]nowingly and willfully tampering with an odometer is not identical to devising or intending to devise a fraudulent scheme.") (comparing 18 U.S.C. 1341 with 15 U.S.C. 1984 and 1998c(a)); *Sansone* v. *United States*, 380 U.S. 343, 352-353 (1965) (analyzing elements of 26 U.S.C. 7207 and concluding that they are a subset of elements in 26 U.S.C. 7201).

A. Bank Larceny Contains Statutory Elements That Bank Robbery Does Not Have

"[T]he language of the statutes that Congress enacts provides 'the most reliable evidence of its intent.'" *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (quoting *United States* v. *Turkette*, 452 U.S. 576, 593 (1981)). Because Congress is solely responsible for defining federal crimes, see *Staples* v. *United States*, 511 U.S. 600, 604-605 (1994), this Court will "ordinarily resist reading words or elements into a statute that do not appear on its face," *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (specific intent to defraud is not an element of the offense of misapplication of funds, 20 U.S.C. 1097(a)); see *United States* v. *Wells*, 519 U.S. 482, 490-493 (1997) (materiality is not an element of the offense of making a false statement to a federal bank, 18 U.S.C. 1014). That principle is especially apt here because bank robbery and bank larceny are defined in a single provision, thus highlighting the significance of Congress's choice of contrasting terminology. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates*, 522 U.S. at 29-30 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Section 2113 of Title 18 punishes crimes against banks in five subsections, the first two of which are bank robbery (18 U.S.C. 2113(a)) and bank larceny (18 U.S.C. 2113(b) (Supp. IV 1998)).[3] Bank larceny is not a

[3] Section 2113 punishes diverse crimes against banks. Section 2113(a) provides, in separate paragraphs, that bank robbery and entry into a bank with the intent to commit a felony therein are crimes punishable by up to 20 years' imprisonment. Section 2113(b) provides that bank larceny of property exceeding $1000 is a crime punishable by up to ten years' imprisonment. In a separate paragraph, Section 2113(b) states that bank larceny of property not exceeding $1000 is a crime punishable by a fine of up to $1000, imprisonment not to exceed one year, or both.

Section 2113(c) makes receipt of stolen bank property a crime and provides for the punishment set forth in Section 2113(b). 18 U.S.C. 2113(c). Section 2113(d) states that aggravated assault during a bank robbery or bank larceny is a crime and provides for up to 25 years' imprisonment. 18 U.S.C. 2113(d). Section 2113(e) provides that a homicide or kidnapping committed during the commission of a crime againrt a bank defined in this section is subject to a minimum of ten years' imprisonment for the kidnapping and life imprisonment for the homicide. 18 U.S.C. 2113(e).

lesser included offense of bank robbery because Section 2113(b) contains elements not present in Section 2113(a). Nothing in either subsection expresses an intent by Congress to create greater and lesser included offenses between the first paragraph of subsection (a) and subsection (b), as Congress explicitly did in subsections (d) (18 U.S.C. 2113(d)) and (e) (18 U.S.C. 2113(e)) for other offenses established in Section 2113.[4]

Section 2113(a) provides, in its first paragraph, that, "[w]hoever, by force and violence, or by intimidation,

[4] Section 2113(d), for example, is a greater offense of those created in subsections (a) and (b), because it provides that "[w]hoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be * * * imprisoned not more than twenty-five years." 18 U.S.C. 2113(d).

Similarly, Section 2113(e) expresses an unequivocal intent to create a greater offense by providing that, "[w]hoever, in committing any offense defined in this section, * * * kills any person, * * * shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment." 18 U.S.C. 2113(e).

takes, or attempts to take, * * * any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association," is guilty of an offense that is punishable by up to twenty years in prison. 18 U.S.C. 2113(a). Section 2113(b), by contrast, provides that anyone who "takes *and carries away, with intent to steal or purloin,* any property or money or any other thing of value *exceeding $1,000* belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association," is guilty of an offense punishable by up to ten years in prison. 18 U.S.C. 2113(b) (Supp. IV 1998) (emphasis added). Section 2113(b) thus requires proof, as the italicized terms indicate, of three elements not present in Section 2113(a): (1) a specific intent to steal or purloin; (2) a requirement that the property be "carr[ied] away"; and (3) a provision that the property taken have a monetary value.

1. ***Bank larceny, unlike bank robbery, requires proof of a specific intent to steal***

a. While bank larceny contains an express "intent to steal or purloin" element, bank robbery has no such mental element in its text. The omission of that phrase is significant. Although the phrases "general intent" and "specific intent" have "been the source[s] of a good deal of confusion," *United States* v. *Bailey*, 444 U.S. 394, 403 (1980), "[t]he distinction between 'general intent' and 'specific intent' is not without importance in the criminal law," 1 W. LaFave & A. Scott, *Substantive Criminal Law* 315 (1986 & Supp. 1999).

> [T]he most common usage of "specific intent" is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime. Common law larceny, for example, requires the taking and carrying away of the property of another, and the defendant's mental state as to this act must be established, but *in addition* it must be shown that there was an "intent to steal" the property.

1 W. LaFave & A. Scott, *supra*, at 315 (emphasis added). By including a specific intent requirement in Section 2113(b) but not in the first paragraph of Section 2113(a), Congress intended that a prosecution for bank larceny establish a "special mental element * * * above and beyond" the general mental state required for the *actus reus* of the crime. Congress's omission of the specific "intent to steal" from the first paragraph of Section 2113(a) also contrasts with its provision of a different specific intent element—the "intent to commit in such bank * * * any felony affecting such bank" in the second paragraph of Section 2113(a).[5] That aspect

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[5] The second paragraph of Section 2113(a) is sometimes referred to as the bank burglary offense. The interrelationship between the bank burglary offense, which is not at issue in this case, and Section 2113(b) is not entirely clear. The second paragraph of Section 2113(a) makes it an offense to enter a bank "with intent to commit * * * any larceny." 18 U.S.C. 2113(a). As one commentator has noted:

> [D]espite the fact that section 2113(b) carries a lesser maximum penalty than section 2113(a), it does not seem that section 2113(b) is a lesser included offense of the second paragraph of section 2113(a) * * * . Consequently, when prosecutors are presented with crimes that would seem to be section 2113(b) violations, it appears that they can attempt to prosecute the defendant under the second paragraph of section 2113(a) with no limitations.

3 L. Sand et al., *Modern Federal Jury Instructions* ¶ 53.01, at 53-4 (1999).

of Section 2113(a) strongly suggests that if Congress had intended to require proof of an "intent to steal" to establish bank robbery, it would have said so expressly. Indeed, one court of appeals has concluded that the omission of a specific intent element in the first paragraph of Section 2113(a) and the inclusion of specific intent elements in the second paragraph of Section 2113(a) and in Section 2113(b) "shows careful draftsmanship." *United States* v. *DeLeo*, 422 F.2d 487, 490 (1st Cir.), cert. denied, 397 U.S. 1037 (1970).[6]

b. The omission of a specific intent requirement in the bank robbery offense in Section 2113(a) is consistent with robbery offenses defined elsewhere in the criminal code. Unlike larceny, which federal law has consistently defined to require proof of a specific intent permanently to deprive, robbery has not always been

[6] Petitioner is not assisted by his contention (Br. 11-14) that structural features of Section 2113 require deeming bank larceny to be a lesser included offense of bank robbery. First, petitioner notes (Br. 11-12) that Section 2113(c) creates a crime of receiving stolen property that expressly applies only to bank larceny. Petitioner argues that it would be unusual for Congress not to punish receipt of property after a robbery as well. The answer, however, is that in most cases receipt of the proceeds of bank robbery will be covered by Section 2113(c). See note 25, *infra*. In any event, nothing in Section 2113(c) purports to redefine the elements required under Section 2113(a).

Second, petitioner observes (Br. 13-14) that Section 2113(a) punishes, in its second paragraph, entering a bank with the intent to commit a federal felony affecting the bank "or any larceny." That provision does not imply that larceny is a lesser offense of robbery; rather, the unlawful-entry provision applies comprehensively to *all* federal felonies affecting the bank. See, *e.g.*, *United States* v. *Pick*, 724 F.2d 297 (2d Cir. 1983) (mail fraud under 18 U.S.C. 1341 also a predicate offense for unlawful bank entry offense of second paragraph 18 U.S.C. 2113(a)).

defined that way. In 1946, Congress amended the Hobbs Anti-Racketeering Act (Hobbs Act), 18 U.S.C. 1951, to punish certain extortion and robbery offenses. The 1946 amendment defined robbery as the "unlawful taking * * * of personal property, from the person * * * by means of actual or threatened force, or violence, or fear of injury." Act of July 3, 1946, ch. 537, § 1(b), 60 Stat. 420. No specific intent element was provided. That definition was carried over to the present version of 18 U.S.C. 1951 during the 1948 codification. See Act of June 25, 1948, ch. 645, 62 Stat. 683.[7]

The absence of an express intent to steal element is characteristic of other federal robbery statutes, many of which merely define robbery as the forcible taking of the victim's property and omit any reference to a specific mental requirement. For example, Section 2111 criminalizes robbery in the special maritime and territorial jurisdiction of the United States, and does not contain an express specific intent to steal requirement. 18 U.S.C. 2111. The same is true of Section 2118(a), which Congress enacted in 1984 to criminalize robbery of controlled substances. 18 U.S.C. 2118(a). And Section 2119, which Congress enacted in 1992 to reach carjacking offenses, contains no explicit intent-to-steal element; rather, it requires proof of an "intent to cause death or serious bodily harm." 18 U.S.C. 2119

[7] Accordingly, courts have held that requests for specific intent instructions in Hobbs Act cases are properly denied, with the requisite intent being knowledge. See, *e.g.*, *United States* v. *Arambasich*, 597 F.2d 609, 614 (7th Cir. 1979) (specific intent instruction not required under Hobbs Act); *United States* v. *Warledo*, 557 F.2d 721, 729 n.3 (10th Cir. 1977) ("Under the clauses of Section 1951, proscribing the obstruction, delay, or attempt to obstruct commerce by robbery or extortion, a general intent to commit those crimes is required.").

(Supp. IV 1998).[8] In enacting Section 2119, Congress specifically tracked the language of Sections 2111, 2113, and 2118. See H.R. Rep. No. 851, 102d Cong., 2d Sess. Pt. 1, at 17 (1992). In discussing the "with intent to cause death or serious bodily harm" element of the carjacking statute, Senator Leahy noted in 1997 that "knowingly" is the only mental element required for the usual robbery offense. See 143 Cong. Rec. S1661 (daily ed. Feb. 26, 1997) ("Robbery offenses typically require only what the carjacking statute formerly required by way of scienter, *i.e.*, that property be knowingly taken from the person or presence of another by force and violence or by intimidation.").

Like the omission of a specific intent element in Section 2113(a), the omission of an intent to steal from those other federal robbery statutes cannot be attributed to inadvertence.[9] While common law robbery was generally understood to contain a specific intent to steal element, see pp. 29-30, *infra*, "Congress' silence [in Section 2113(a)] speaks volumes * * * [and] Congress appears to have made the choice quite deliberately" in omitting any such requirement from Section 2113(a). *United States* v. *Shabani*, 513 U.S. 10, 14 (1994) (holding that absence of an overt act requirement from

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[8] In *Holloway* v. *United States*, 526 U.S. 1 (1999), this Court held that proof of a person's conditional intent "to cause death or serious bodily harm" under 18 U.S.C. 2119 (Supp. IV 1998) satisfied that mental element.

[9] Other—usually older—statutes use the term "rob" or "robbery" without further elaboration. See, *e.g.*, 18 U.S.C. 2112 (robbery of personal property of United States); 18 U.S.C. 2114 (robbery of mail matter); 18 U.S.C. 1661 (robbery ashore). Those statutes, unlike Section 2113(a), retain the common law meaning of robbery. See p. 41, *infra*.

21 U.S.C. 846 was dispositive, notwithstanding that such proof was required for common law conspiracy).

c. State robbery statutes, like the various robbery offenses in Title 18, vary widely as to whether the specific intent to steal is an element of robbery. In most States, robbery has been defined by the state legislature as a greater offense of larceny (or theft) and thus to require proof of a specific intent to steal. See, *e.g.*, Ala. Code § 13A-8-43 (1994) (defining robbery as use of force "in the course of committing a theft," which under Section 13A-8-2 is defined as knowingly exerting control over property "with intent to deprive the owner of his property"); Ark. Code Ann. § 5-12-102 (Michie 1997) ("A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another."); Conn. Gen. Stat. Ann. § 53a-133 (West 1994) ("A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person."); N.H. Rev. Stat. Ann. § 636:1 (1996) (defining robbery as use or threat of physical force "in the course of committing a theft"). State courts construing such statutes have held that the government must prove that the defendant had a specific intent to deprive the victim of his property. See, *e.g.*, *People* v. *Ocasio*, 697 N.Y.S.2d 368, 369-370 (App. Div. 1999); *State* v. *Celaya*, 660 P.2d 849, 852-853 (Ariz. 1983) (in banc); *State* v. *Nix*, 922 S.W.2d 894. 901 (Tenn. Crim. App. 1995).

By contrast to those States that contain a specific mental element requirement in the statutory definition of robbery, a number of States do not provide for such a mental element in the statutory crime of robbery. In those States, the state courts uniformly have held that

the specific intent to steal should not be read into the robbery offense. See, *e.g.*, *State* v. *Payne*, 540 So. 2d 520, 523-524 (La. Ct. App. 1989) (holding that under new Louisiana statute "[a]rmed robbery is a general intent crime" for which the "criminal intent necessary to sustain a conviction is shown by the very doing of the acts which have been declared criminal"); *Nell* v. *State*, 642 P.2d 1361, 1366 (Alaska Ct. App. 1982) ("We see no reason to add to the statute an intent to permanently deprive another of the property" because "the legislature, in passing this robbery statute, intended to emphasize the fact that robbery is a crime against the person and deemphasize the theft aspects of the offense."); *Litteral* v. *State*, 634 P.2d 1226, 1227 (Nev. 1981) (sustaining trial court's refusal to "instruct the jury that the defendant had to take the property with a specific intent to deprive the victim permanently of his property" because statutory definition of robbery did not require that element); *People* v. *Moseley*, 566 P.2d 331, 335 (Colo. 1977) (en banc) ("The statutory language contains no suggestion that robbery requires any specific intent to permanently deprive the owner of the use or benefit of the thing taken."); *State* v. *Thompson*, 558 P.2d 1079, 1086 (Kan. 1976) (noting that "the new statutes broadened the statutory crime of robbery to cover any taking of property from the person or presence of another by threat of bodily harm or by force [and] [t]he requirement of a specific intent to deprive the owner permanently of his property was eliminated"); *Traxler* v. *State*, 251 P.2d 815, 835 (Okla. Crim. App. 1953) (holding that state statute had changed common law definition of robbery by not including element that "the taking be with the felonious intent to take and

permanently deprive the owner").[10] Thus, although the practice in the States does not directly shed light on what Congress intended in the drafting history of bank robbery in 18 U.S.C. 2113(a), Congress's omission of a specific intent element in the federal bank robbery offense was not unusual in light of similar omissions (and specific inclusions) by state legislatures that have created robbery offenses in statutory law.

d. Although bank robbery has no specific intent to steal element, that does not mean that it lacks a mental element altogether. The "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples*, 511 U.S. at 605 (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 (1978)). There is a presumption that any federal criminal offense requires a mental element. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). Accordingly, this Court has read a mental element into a criminal statute even where the statute did not expressly provide for one. See *Staples*, *supra* (possession of an unregistered firearm, in violation of 26 U.S.C. 5861(d)); *Bailey*, *supra* (escape, in violation of 18 U.S.C. 751(a)); *United States Gypsum Co.*, *supra* (Sherman Act); *Morissette* v.

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[10] It appears to be quite rare for a State not to have codified the robbery offense. Virginia, for example, has never codified the elements of robbery, relying instead on the common law definition. See *Cox* v. *Commonwealth*, 240 S.E.2d 524 (Va. 1978); *Ayres* v. *Commonwealth*, 161 S.E. 888, 897 (Va. 1932) ("At common law robbery is defined as the taking, with intent to deprive the owner permanently, of personal property, from his person or in his presence, against his will, by violence or intimidation."); see also Va. Code Ann. § 18.2-58 (Michie 1996) (defining punishment for person who commits robbery).

United States, 342 U.S. 246 (1952) (theft, in violation of 18 U.S.C. 641).

In like fashion, the courts of appeals that have ruled that bank robbery is not a specific intent crime have nevertheless construed the statute to contain a "general intent" requirement. See, *e.g.*, *United States* v. *Gonyea*, 140 F.3d 649, 653-654 (6th Cir. 1998); *United States* v. *Fazzini*, 871 F.2d 635, 641 (7th Cir.), cert. denied, 493 U.S. 982 (1989); *United States* v. *Emery*, 682 F.2d 493, 497 (5th Cir.), cert. denied, 459 U.S. 1044 (1982); *United States* v. *Smith*, 638 F.2d 131, 132 (9th Cir. 1981); *United States* v. *Johnston*, 543 F.2d 55, 58 (8th Cir. 1976); *United States* v. *DeLeo*, *supra*.[11] Those cases have held that a defendant must be shown to have acted "knowingly" with respect to each *actus reus*, a view that is consistent with the notion that, when a person performs acts proscribed by Congress, criminal liability should be imposed regardless of whether that person desired or merely knew of the practical certainty of the results. See *Bailey*, 444 U.S. at 404; *United States Gypsum Co.*, 438 U.S. at 445; see generally 1 W. LaFave & A. Scott, *supra*, § 3.5.[12] Those

[11] Those courts were considering whether diminished capacity is a defense to bank robbery. Because "diminished capacity is a defense only to *specific* intent crimes," evidence of alcohol-induced unconsciousness and other forms of diminished capacity is irrelevant in a Section 2113(a) case because "completed armed bank robbery is a *general* intent crime." *Fazzini*, 871 F.2d at 641; see also *Smith*, 638 F.2d at 132.

[12] In this case, the indictment and the jury instructions establish that the jury found that petitioner committed his robberies with the requisite intent. The indictment alleged that petitioner acted "knowingly and willfully." J.A. 2. The jury was instructed that the intimidation element required proof that petitioner acted "knowingly and deliberately." J.A. 56. The jury was charged that the "knowingly" element was to ensure that no person would be convicted of an act done by mistake, accident, or other innocent reason. J.A. 55. The district court's ruling on petitioner's Rule 29 motion for acquittal further establishes that sufficient evidence existed of defendant's knowing use of intimidation to take the money from the bank. J.A. 23-32.

cases are also consistent with the decisions of state courts, which, in construing robbery statutes that lack a specific mental element, have held that robbery is a general intent crime requiring proof that the defendant knew he was using force to take property from the person of another. See pp. 18-19, *supra*.

e. Limiting the mental element of bank robbery to "knowingly" taking by force, violence, or intimidation, instead of an intent to steal, is appropriate in light of the character of that crime. "[T]he gist of [robbery] is a crime against the person." *United States* v. *Mann*, 119 F. Supp. 406, 407 (D.D.C. 1954). Without regard to the robber's intent to steal, the robbery offense warrants sanction because of the fear it instills in the victims and the risk that they will suffer harm, be it physical or emotional. Bank robberies often occur when employees and customers are in the bank, and robbers often carry and use firearms to gain an advantage over the people inside. After a robbery or attempted robbery, the bank may have to interrupt its business to attend to the needs of the victims, to cooperate with authorities, and to reassure its customers. For those reasons, the bank robbery offense defined in Section 2113(a) punishes the attempt to rob as well as the completed act.

Because the use of force, violence, and intimidation causes social harms regardless of whether the robber has a specific intent to dispossess the bank of its property permanently, it is logical to construe the first paragraph of Section 2113(a) as not requiring a specific

intent to steal. The bank robbery statute "describe[s] acts which, when performed, are so unambiguously dangerous to others that the requisite mental element is necessarily implicit in the description." *DeLeo*, 422 F.2d at 491. "It therefore is immaterial for sections 2113(a) and (d) whether the subjective intent of a bank robber is to steal that to which he has no claim or to recover his own deposit; the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes." *Ibid.*[13]

Larceny, on the other hand, is a crime principally committed against property, see R. Perkins & R. Boyce, *Criminal Law* 343-344 (3d ed. 1982), and the specific intent requirement has always been a critical element of that offense: there is no larceny without an intent to deprive the owner permanently of the property taken. 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.5 (1986 & Supp. 1999). The same cannot be said of bank robbery in violation of Section

[13] Undoubtedly, most bank robbers will intend to deprive the bank permanently of its property, but that will not invariably be the case. One reported court of appeals' decision records that a man robbed a bank solely to be apprehended and returned to prison so he could be treated for his alcohol problem. See *United States* v. *Lewis*, 628 F.2d 1276 (10th Cir. 1980), cert. denied, 450 U.S. 924 (1981). We are informed by the FBI that indictments are brought as often as every year against former incarcerees who commit bank robbery with the intent not of taking the money but of being returned to prison because of their inability to cope with life in free society. Because those cases invariably result in guilty pleas, they do not result in reported decisions. The same is true in the less frequent instance of bank robbers who rob banks primarily to disrupt the bank's business with violence. Terrorists, for example, may well be indifferent to the fate of the bank's property. Those sorts of robberies nevertheless come within the coverage of Section 2113(a).

2113(a). Congress's decision to distinguish the offenses in Section 2113 thus is a reasonable basis for a judgment that the two crimes are different in nature and that the bank larceny offense is not simply a lesser degree of bank robbery.[14]

2. *Bank larceny, unlike bank robbery, requires proof that the defendant "carries away" the property*

The Section 2113(a) and (b) offenses also have different *actus reus* requirements. Both offenses use the word "take[]" to describe the *actus reus* of the crime. That word is defined as "[t]o get into one's hands or into one's possession, power, or control by force or stratagem." *Webster's Third New International Dictionary* 2329 (1986); cf. *United States* v. *Moore*, 73 F.3d 666, 668-669 (6th Cir.) (using that definition to define "take" in the carjacking statute, 18 U.S.C. 2119 (Supp. IV 1998),

[14] Petitioner suggests that the "intent to steal or purloin" element from Section 2113(b) may be inferred in Section 2113(a) from the words "takes . . . *from* the person of another" (emphasis added) since the definition of steal is "to take the property *of* another." Pet. Br. 11 (emphasis added). That imprecise reading of the statute, however, would lead to incongruous results. A robber may forcefully take property *from* another person believing himself to be the rightful owner, intending to return it, or seeking to have himself apprehended so that he can be re-incarcerated. Such wrongful behavior would not be stealing, since there would be no intent to deprive permanently the owner of the property. Ironically, although throughout his brief petitioner advocates incorporation of common-law elements in the bank robbery statute notwithstanding their explicit omission, petitioner asks this Court to expand the statutory definition of "takes"—one of the few common-law words adopted by Congress in defining the Section 2113(a) offense—well beyond its common law meaning of obtaining possession of property. See R. Perkins & R. Boyce, *supra*, at 302-303.

and holding that "[a]n intent to permanently deprive is not an element of the federal offenses covering the mere 'taking' from the 'person or presence' of another") (citing 18 U.S.C. 2111, 2113, 2118), cert. denied, 517 U.S. 1228 (1996). Section 2113(b), however, *also* requires that the perpetrator "carries away" the property. The term "carry" is defined as "to move while supporting." *Webster's*, *supra*, at 343; see *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998). The phrase, "carries away" has common law antecedents, and means "[t]he act of removal or asportation, by which the crime of larceny is completed, and which is essential to constitute it." *Black's Law Dictionary* 194 (6th ed. 1986). That asportation element is not present in the Section 2113(a) offense.

This Court has repeatedly noted that "a court should 'give effect, if possible, to every clause and word of a statute.'" *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990). That is particularly the case with elements of criminal offenses. See *Ratzlaf* v. *United States*, 510 U.S. 135, 140-141 (1994). Thus, notwithstanding petitioner's assertion (Br. 40) that Congress "tacitly included the asportation requirement as an element of the offense," this Court ordinarily presumes "that Congress acts intentionally and purposely" when including language in one part of a statute but omitting it from another. *Bates*, 522 U.S. at 29-30. Given that Congress specifically used the phrase "carries away" in Section 2113(b), it should not be lightly read into the text of Section 2113(a). See *ibid.*

That conclusion is especially important here, where the phrase in question had a distinctive common law connotation. As commentators explain, "[a] movement does not amount to asportation unless it is a *carrying-away* movement." R. Perkins & R. Boyce, *supra*, at

324. "The requirement of asportation may be eliminated entirely by statute, * * * but so long as it is retained, the common-law concept of a carrying-away movement should be required." *Ibid.* See also 2 W. LaFave & A. Scott, *supra*, at 348. Courts in States that have codified robbery offenses without a "carry away" element have uniformly held that the prosecution need not prove asportation.[15] Likewise, robbery as defined in Section 2113(a) should not be encumbered by common law limitations that Congress expressly elected to retain only for the bank larceny offense.

3. *Bank larceny, unlike bank robbery, requires proof that the property has a monetary value*

A third textual element found in bank larceny but not in bank robbery is the requirement that the prosecution

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[15] See, *e.g.*, *State* v. *Boyle*, 970 S.W.2d 835, 838 (Mo. Ct. App. 1998) (upholding robbery conviction where defendant had not moved the property because under state statute "asportation is not an element of robbery"); *State* v. *Valdez*, 977 P.2d 242, 253 (Kan. 1999) ("Commission of robbery is complete when the robber takes possession of property; the element of asportation is not required to complete theft or robbery" under Kan. Stat. Ann. § 21-3426 (1995).); *Johnson* v. *State*, 744 So. 2d 833, 837 (Miss. Ct. App. 1999) (noting that "[p]roof of asportation, though an element of larceny, is not necessarily an element of robbery" since the statute includes as robbery "the mere attempt to take the property of another from his person or presence"); *State* v. *Gore*, 722 N.E.2d 125, 129 (Ohio Ct. App. 1999) (noting that "a robbery does not necessarily require asportation" under Ohio Rev. Code Ann. § 2911.01(A)(1) (Anderson 1999)). By contrast, in States where asportation is an element of robbery, courts have overturned convictions for failure by the prosecution to prove that the defendant carried away the property taken. See, *e.g.*, *State* v. *Johnson*, 558 N.W.2d 375 (Wis. 1997) (rejecting State's argument that asportation is not an element of robbery and holding that robbery of car involved no asportation where it failed to start or move).

prove that the property taken is reducible to a monetary value. Section 2113(b) permits a sentence of up to ten years' imprisonment if the stolen property exceeds $1000 in value, but only a sentence of up to one year imprisonment if the value is less than that amount. Thus, in a Section 2113(b) prosecution, the jury must be instructed to find that the property taken exceeded the amount necessary to trigger the greater punishment. See *United States* v. *Hoke*, 610 F.2d 678, 679 (9th Cir. 1980). Section 2113(a), on the other hand, contains no such monetary requirement. Rather, it proscribes the forceful taking of "any property or money or any other thing of value belonging to" the financial institution at issue, or the attempt to do so. Section 2113(a) thus criminalizes the forceful taking of property without requiring a jury finding as to the value of the property taken.

Petitioner contends (Br. 42-43) that the $1000 monetary threshold in Section 2113(b) bank larceny is a sentencing factor rather than an element of the offense. That analysis is incorrect. The $1000 is not simply an enhancement of the potential penalty a defendant faces. Rather, Congress deliberately set out two grades of the larceny offense in separate paragraphs, each of which defines a complete offense.[16] In addition, the value of the property taken differentiates a felony from a misdemeanor offense. See 18 U.S.C. 3559(a). The Fifth Amendment provides for federal felony charges to be made by a grand jury indictment; no such requirement

[16] Each paragraph begins with the word, "whoever"; it then describes the prohibited conduct, the intent required, and the nature of the property taken; and it concludes with a sentencing provision. That is the natural way to define a free-standing offense. See *Jones* v. *United States*, 526 U.S. 227, 233-234 (1999).

exists for misdemeanors. See *Ex parte Wilson*, 114 U.S. 417, 429 (1885) (defining "infamous crime" in Fifth Amendment as one "punishable by imprisonment at hard labor in a * * * penitentiary"). See generally Fed. R. Crim. P. 7(a); W. LaFave & J. Israel, *Criminal Procedure* § 15.1(a) at 616 (1985) (*Ex parte Wilson* definition "encompasses all federal felony offenses"). Contrary to petitioner's citation (Br. 43-44), nowhere did Blackstone report otherwise with regard to the "twelvepence" distinction between grand larceny and petit larceny. Rather, even at common law the valuation element differentiated the larceny offenses in a manner that would affect how they were charged and proved at trial. See R. Perkins & R. Boyce, *supra*, at 335 ("For many years the almost universal plan made grand larceny a felony and petit larceny a misdemeanor, although there were wide differences in the determination of the grade.").[17]

[17] The monetary valuation element in the theft of government property offense of 18 U.S.C. 641 distinguishes between felony and misdemeanor theft based on the value of the property taken. Courts appear uniformly to hold that the government must charge in the indictment and prove to the jury that the value of the property exceeds the threshold for felony theft. See, *e.g.*, *United States* v. *DiGilio*, 538 F.2d 972, 978 (3d Cir. 1976) (valuation an element of Section 641 offense), cert. denied, 429 U.S. 1038 (1977); *Stevens* v. *United States*, 297 F.2d 664, 665 (10th Cir. 1961) (per curiam) ("Value is an essential element of the offense [under 18 U.S.C. 641] which must be alleged and proved in the same manner as any other essential element of the offense."); *United States* v. *Wilson*, 284 F.2d 407, 408 (4th Cir. 1960) (holding value an element of the offense); *Cartwright* v. *United States*, 146 F.2d 133, 135 (5th Cir. 1944) (considering it "well settled that where the grade of larceny, and consequently the punishment, depend on the value of the property, it is essential that the value of the property defendant is charged with having taken be alleged and proved").

State practice supports that conclusion. Cf. *Jones*, 526 U.S. at 236 (discussing bodily injury factor in state robbery statutes). State statutes with similar language to the monetary valuation element in Section 2113(b) bank larceny have held that, because the valuation element must be proved in a larceny case, and because the prosecution need not prove a monetary value of the property taken to establish robbery, larceny is not a lesser included offense of robbery. *State* v. *Boucino*, 506 A.2d 125, 135 (Conn. 1986) (holding that "the crimes of robbery in the first degree and larceny in the first degree require proof of distinct elements * * * [because] [c]onviction for robbery in the first degree requires proof of varying degrees of force * * * [whereas] the state had to prove the value of the money taken from the bank in order to obtain a conviction on the charge of larceny in the first degree").[18]

[18] See *State* v. *McGarrett*, 535 N.W.2d 765, 769 (S.D. 1995) (applying statutory elements test, grand theft under state statute is not lesser included offense of robbery, because "grand theft requires the stolen property be in excess of $500 [whereas] robbery can be committed without complying with that dollar amount"); *State* v. *Ates*, 377 S.E.2d 98, 99 n.1 (S.C. 1989) ("In a grand larceny prosecution, value is a critical element; it is the State's burden to prove that the value of stolen goods exceeds $200."); *State* v. *Redding*, 331 N.W.2d 811, 813-815 (Neb. 1983) (holding value an element of larceny but ruling that failure to include it was harmless error); *State* v. *Combs*, 316 N.W.2d 880, 883 (Iowa 1982) (holding that monetary valuation is element of second degree theft); *People* v. *Myers*, 73 N.E.2d 288, 291 (Ill. 1947) (holding indictment for larceny "fatally defective" in part "for failure to allege the value of the goods stolen"); *Haley* v. *State*, 315 So. 2d 525, 527 (Fla. Dist. Ct. App. 1975) (holding that grand larceny "is not necessarily included in the offense of robbery" because grand larceny "contains an element not present in the offense of robbery: that the value of the property stolen was one hundred dollars or more"); *Coker* v. *State*, 396 So.2d 1094, 1096 (Ala. Crim. App. 1981) ("[w]hether or not a theft in a particular case is of one degree or another is a question of fact addressed to the jury").

B. The Legislative History Of Section 2113 Does Not Show Congressional Intent To Make Bank Larceny A Lesser Included Offense Of Bank Robbery

In arguing that bank larceny should be treated as a lesser offense of bank robbery, despite the textual elements of bank larceny not found in the putatively "greater" offense, petitioner relies (Br. 14-20) on the rule of statutory construction that "where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *Moskal*, 498 U.S. at 114 (quoting *United States* v. *Turley*, 352 U.S. 407, 411 (1957)). Because larceny was a lesser included offense of robbery at common law, petitioner maintains that Congress must have intended to make the crime proscribed in Section 2113(b) a lesser included offense of the Section 2113(a) crime. See Pet. Br. 24-26. That argument, however, cannot be squared with the legislative history of Section 2113 or this Court's prior construction of the statute. Those sources demonstrate that Congress did not intend merely to codify the common law in Section 2113, but rather intended to create federal offenses with specific elements designed to address contemporary needs.

1. At common law, larceny was generally defined as the felonious taking and carrying away of the personal goods of another with intent to deprive the owner permanently of his property. See, *e.g.*, 4 W. Blackstone, *Commentaries* *229, *232; 2 W. Burdick, *The Law of Crime* 258-263 (1946). Robbery was an aggravated form of larceny; it contained all of the elements of larceny plus two additional ones: (1) the property must be

taken from the person or presence of another (2) by means of force or putting in fear. See 2 W. LaFave & A. Scott, *supra*, §§ 8.2, 8.11, at 333, 437-438. Common law robbery was often defined in simple and undetailed language, such as "the felonious and violent taking of goods or money from the person of another by force or intimidation." *Id.* § 8.11 n.6. The phrase "felonious * * * taking" meant a taking with the intent to deprive the owner permanently of his property. R. Perkins & R. Boyce, *supra*, at 343. Because, under common law, robbery contained all of the elements of larceny (plus the additional elements of personal presence and force), larceny is a lesser included offense of robbery in those jurisdictions that have retained the common law definitions of the two crimes. See, *e.g.*, *Government of the V.I.* v. *Jarvis*, 653 F.2d 762, 765 (3d Cir. 1981); *United States* v. *Belt*, 516 F.2d 873, 875 (8th Cir. 1975), cert. denied, 423 U.S. 1056 (1976). See generally R. Perkins & R. Boyce, *supra*, at 343 (defining "robbery" as "larceny from the person by violence or intimidation").

2. As already interpreted by this Court's decisions, however, the language and background of Section 2113 reveals that Congress did *not* intend to codify the common law in that provision. Before 1934, banks organized under federal law were protected against embezzlement (Rev. Stat. § 5209 (1875 ed.), as amended by the Act of Sept. 26, 1918, ch. 177, § 5209, 40 Stat. 972), but not robbery, larceny, or burglary, which were punishable only under state law. In 1934, Congress enacted the precursor to Section 2113(a) in response to a series of bank robberies committed by John Dillinger and other criminals who moved from State to State and were able to avoid capture by state authorities. See *Jerome* v. *United States*, 318 U.S. 101, 102-104 (1943)

(discussing legislative history of bank robbery statute); *Bell* v. *United States*, 462 U.S. 356, 363-364 (1983) (Stevens, J., dissenting) (same). The Attorney General proposed legislation (S. 2841, 73d Cong., 2d Sess. (1934)) that would have prohibited robbery (§ 4), burglary (§ 3), and theft (§ 2). The 1934 bill passed the Senate in that form, but the House Judiciary Committee, without explanation, struck the burglary and theft provisions from the bill. See *Jerome*, 318 U.S. at 102-104; *Bell*, 462 U.S. at 364 & n.2 (Stevens, J., dissenting). The bill enacted by Congress applied to bank robbery and certain violent crimes committed during a bank robbery. The bank robbery offense punished "[w]hoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank." Act of May 18, 1934, ch. 304, § 2a, 48 Stat. 783.

The 1934 statute left gaps in its protection of federal banks. Because the statute did not cover bank larceny, a person who stole money from a bank without force, violence, or "putting in fear" was immune from federal prosecution. In 1937, the Attorney General proposed amending the bank robbery statute to close that loophole. See H.R. Rep. No. 732, 75th Cong., 1st Sess. 1-2 (1937); *Bell*, 462 U.S. at 361; *Jerome*, 318 U.S. at 103. Congress ultimately passed a bill that prohibited bank larceny and bank burglary. The 1937 statute's larceny offense punished "whoever shall take and carry away, with intent to steal or purloin," property, money, or anything of value from a bank. Act of Aug. 24, 1937, ch. 747, 50 Stat. 749. The 1937 version of bank larceny is

identical to the version presently codified in Section 2113(b) in all relevant respects.[19]

In 1948, Congress codified the criminal code. Act of June 25, 1948, ch. 645, 62 Stat. 683. As part of that codification, Congress made several changes to the bank robbery offense. The principal statutory changes were the deletion of the term "feloniously" before the terms "takes" and "attempts" and the substitution of the term "intimidation" for "putting in fear."[20] The Historical and Revision Notes (Reviser's Note) to Section 2113 are silent on the reason for removing the term "feloniously" from the bank robbery offense. The Reviser's Note stated, in language that mirrored the comprehensive House report accompanying the legislation, that "[n]ecessary minor translations of section references, and changes in phraseology, were made."

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[19] Petitioner argues (Br. 31) that because the 1937 legislation used the common law word "larceny" in its caption, Congress intended for bank larceny to be a lesser included offense of bank robbery. The title to the 1937 law, however, is irrelevant to the construction of the bank robbery offense, since that offense was amended in 1948. In any event, the title to the statute is useful only if there is ambiguity in the text; it may not limit the plain meaning of the statute. See, *e.g.*, *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998); *Railroad Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947).

[20] The 1948 revision also amended the bank burglary offense by substituting the phrase "felony affecting such bank and in violation of any statute of the United States, or any larceny" for the term "felony or larceny." The Historical and Revision Notes (Reviser's Note) indicate that that change was intended to conform the statute to the Court's decision in *Jerome*, which held that the term "felony" in the bank burglary offense embraced only those offenses that are felonies under federal law affecting banks protected by the Act. See also H.R. Rep. No. 304, 80th Cong., 1st Sess. A135 (1947) (same).

See also H.R. Rep. No. 304, 80th Cong., 1st Sess. A135 (1947) (same language used by House Committee to explain change).

3. As the foregoing history demonstrates, the offenses in Section 2113(a) and (b) do not simply replicate their common law antecedents of robbery and larceny. The 1934 and 1937 statutes contained a mix of common law and modern terms. The common law mental element of larceny—"feloniously takes"—was incorporated into bank robbery in 1934 but eliminated in 1948. The mental element of bank larceny—"intent to steal or purloin"—"has no established meaning at common law." *Bell*, 462 U.S. at 360.[21]

This Court has recognized that the 1934 and 1937 statutes contained elements that were broader than the common law. See *Bell*, 462 U.S. at 361 ("Section 2113(b) * * * goes well beyond even this expanded definition" of the common law crime of "larceny," and thus "the

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[21] In *Turley*, 352 U.S. at 411-412, the Court noted that the term "steal[]" had no accepted common law meaning and was never equated with larceny. See *Factor* v. *Laubenheimer*, 290 U.S. 276, 303 (1933). Similarly, the term "purloin," which was not included in the common law definition of larceny (see *LeMasters* v. *United States*, 378 F.2d 262, 264 (9th Cir. 1967)), is virtually synonymous with "steal" and encompasses a broader range of theft offenses than common law larceny. See *United States* v. *Johnson*, 575 F.2d 678, 679-680 (8th Cir. 1978).

An "intent to steal" has a broader scope than the common law's intent to deprive the owner permanently of his property. An intent to steal includes the intent to deprive permanently or for an unreasonable length of time, or in such a way that the owner will thus be deprived of his property. See 2 W. LaFave & A. Scott, *supra*, § 8.5. By contrast, a person does not have a common law intent to steal if he intends to return the very property taken, and it is unclear whether it is a defense that he intended to return equivalent property. *Id.* §§ 8.5(a), 8.5(b), at 358-359, 359-362.

statutory language does not suggest that it covers only common-law larceny."). At common law, larceny was limited to thefts of tangible personal property. The statute, however, covers theft of "any property or money or any other thing of value." 18 U.S.C. 2113(a) and (b) (1994 & Supp. IV 1998). Moreover, common law larceny required a theft from the possession of the owner. By contrast, the bank larceny statute applies when the property is in the "care, custody, control, management, or possession of, any bank." *Ibid.* Based on that broad language, *Bell* held that bank larceny in Section 2113(b) is not limited to common law larcenies. 462 U.S. at 360-361. For similar reasons, there is no sound basis for importing common law elements into Section 2113(a)'s robbery offense that Congress omitted from its text.

4. Petitioner contends (Br. 33-34) that the deletion of the term "feloniously" from the bank robbery statute in the 1948 codification was inadvertent and was not intended to delete the specific intent element from the offense of bank robbery. He maintains that that amendment was part of Congress's decision to delete most references to "felony" and "misdemeanor" from the Code because those terms were defined in Section 1 of Title 18. See 18 U.S.C. 1 (1982).[22]

Petitioner's contention is incorrect. When Congress deleted the term "felony" or "misdemeanor" from a

[22] Congress codified those terms in one section because, before 1948, the lack of uniformity in statutory usages of "felony" and "misdemeanor" had caused courts to diverge when assessing whether a particular crime should be punished as a felony or a misdemeanor. See H.R. Rep. No. 304, *supra*, at A2-A4. Section 1 of Title 18 was repealed by Department of the Interior and Related Agencies Appropriation Act, Pub. L. No. 98-473, Tit. II, § 218(a)(1), 98 Stat. 2027.

statute because of Section 1, the Reviser's Notes to the statute specifically explained that as the reason for the change.[23] By contrast, the Reviser's Note to Section 2113(a) is silent on the reason for the deletion of "feloniously." See also H.R. Rep. No. 304, *supra*, at A134-A135 (same). Thus, petitioner (Br. 32-34) has no basis for asserting that Section 1 was the reason Congress deleted "feloniously" from Section 2113(a).

The disputed deletion was not an isolated action. Congress also deleted the term "feloniously" before the term "takes" in the offense that proscribes a forceful taking within the special maritime and territorial jurisdiction of the United States under Section 2111. 18 U.S.C. 2111; see Act of Mar. 4, 1909, ch. 321, § 284, 35 Stat. 1144.[24] The Reviser's Note gives no reason for that deletion, stating only that "[m]inor changes were made in phraseology." See also H.R. Rep. No. 304, *supra*, at A134 (same). Nor is petitioner aided by the

[23] See, *e.g.*, Reviser's Note to 18 U.S.C. 751 ("References to offenses as felonies or misdemeanors were omitted in view of definitive section 1 of this title."), H.R. Rep. No. 304, *supra*, at A67 (same); Reviser's Note to 18 U.S.C. 550 ("Reference to felony * * * was omitted as unnecessary in view of definition of felony in section 1 of this title."), H.R. Rep. No. 304, *supra*, at A47 (same); Reviser's Note to 18 U.S.C. 2076 ("The reference to the offense as a misdemeanor was omitted as unnecessary in view of the definition of 'misdemeanor' in section 1 of this title."), H.R. Rep. No. 304, *supra*, at A134 (same); Reviser's Note to 18 U.S.C. 1951 ("Provisions designating offense as felony were omitted as unnecessary in view of definitive section 1 of this title"), H.R. Rep. No. 304, *supra*, at A131 (same).

[24] Section 2111 of Title 18 provides: "Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years."

statement in the Reviser's Note that only changes "in phraseology" were made. Where Congress specifically deletes or omits an element of an offense from the statute, the change is substantive despite the Revisers' Notes to the contrary. See *Wells*, 519 U.S. at 497 (noting that "[d]ropping the materiality element from the three [bank offenses] could not, then, reasonably have been seen as making no change" and that "[t]hose who write revisers' notes have proven fallible before"); *United States* v. *Lanier*, 520 U.S. 259, 268 n.6 (1997) ("The legislative intent of Congress is to be derived from the language and structure of the statute itself, if possible, not from the assertions of codifiers directly at odds with clear statutory language."). In short, the Reviser's Notes are not a basis for disregarding the plain language of Section 2113(a), which, unlike Section 2113(b), does not contain specific intent, asportation, or monetary valuation requirements.

C. Precedent And Canons Of Statutory Interpretation Do Not Support Petitioner's Argument

1. Petitioner contends (Br. 36-37) that *Prince* v. *United States*, 352 U.S. 322 (1957), indicates that bank robbery contains the same intent to steal element as bank larceny. That contention is mistaken. In *Prince*, the Court held that Congress did not authorize cumulative punishment for convictions for bank robbery and entering the bank with intent to commit a felony, both of which are prohibited by Section 2113(a). The Court reasoned that Congress inserted the offense of unlawful bank entry into the statute in 1937 to reach a person who entered a bank to rob it but was able to obtain the bank's money without using force or intimidation, and it inserted larceny offenses for similar reasons. The Court stated that the statute could serve the purpose of

reaching those acts without being read to create completely independent offenses. Thus, while it "was manifestly the purpose of Congress to establish lesser offenses" in drafting the statute, the Court found no indication that Congress intended to "pyramid" the penalties. *Id.* at 327.

The Court's statements that Congress's purpose was to create lesser offenses in the 1937 legislation and that the mental element of an intent to steal required for unlawful bank entry "merges" into the offense of bank robbery upon consummation of the robbery, 352 U.S. at 328, do not resolve the issue in this case. First, the "narrow" issue before the Court, *id.* at 325, was whether the statute authorized cumulative punishment for the two offenses, and that was the only issue the Court resolved, *id.* at 324-325. Thus, even if this Court were to apply the holding of *Prince* to convictions obtained under the first paragraph of Section 2113(a) and Section 2113(b), such a holding would not compel a trial court to give an instruction for a lesser included offense if the government were to indict the defendant only for a violation of Section 2113(a). A proper application of *Prince* would require only that guilty verdicts under those two provisions be merged into one conviction.

Merger analysis is separate from the lesser offense issue presented here. Under this Court's cumulative punishment jurisprudence, the test is whether Congress intended to authorize *punishment* for the two crimes to be imposed cumulatively. If it so chooses, Congress can authorize cumulative punishment for a greater and lesser offense. Cf. *Missouri* v. *Hunter*, 459 U.S. 359 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 340 (1981). Likewise, Congress can forbid cumulative punishment even where two crimes may not bear

the relation of greater and lesser offenses. See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11 (1978) (finding cumulative punishment barred for two offenses, but not reaching question whether offenses were greater and lesser offenses). Thus, it was not necessary for the Court in *Prince* to conclude that bank robbery had an intent-to-steal element to hold that cumulative punishment was barred for bank robbery and unlawful entry of a bank.

Second, although *Prince* remarked in passing that "the purpose of Congress [was] to establish lesser offenses," 352 U.S. at 327, the Court in that case did not analyze the lesser included offense issue by comparing the elements of each offense. This Court's subsequent decision in *Schmuck* now requires that approach. Indeed, in conducting its analysis, the *Prince* Court did not even have before it a charge of Section 2113(b) bank larceny in the case. Thus, *Prince* does not establish that bank larceny is a lesser included offense of bank robbery.[25]

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[25] Nor does this Court's decision in *United States* v. *Gaddis*, 424 U.S. 544 (1976), support the conclusion that Section 2113(b) is a lesser included offense of bank robbery. In that case, the Court held that a defendant could not be separately convicted for both committing bank robbery in violation of Section 2113(a) and for receiving the proceeds of a bank theft in violation of Section 2113(c). It also held that if a jury erroneously did so, the defendant would not be entitled to a new trial if the evidence supported the verdict as to conviction for the Section 2113(a) offense. *Id.* at 550. While *Gaddis* could be taken to imply that bank larceny is a lesser offense of bank robbery (since subsection (c) explicitly refers only to the larceny and not the robbery subsection), that is not a point that the Court explicitly made or on which it relied in its holding. *Gaddis* therefore simply prevents unintended multiple punishments under Section 2113; it does not express a view of greater and lesser offenses under that provision. Indeed, *Gaddis* relied on

Finally, the essential holding of *Prince* is that Congress did not intend to pyramid punishments for unlawful bank entry and completed bank robbery; today that result would be achieved under the Sentencing Guidelines. Sentencing under the Guidelines generally takes account of the total course of a defendant's conduct and "groups" the related counts to prevent improper incremental punishment for closely related counts. See Sentencing Guidelines Ch. 3, Pt. D (1995). Thus, if a defendant in the position of petitioner were to be charged and convicted separately of Section 2113(a) bank robbery and Section 2113(b) bank larceny, the bank larceny conviction would have no effect on petitioner's length of incarceration. See *id.* § 2B3.1 (Robbery Guideline).

2. Petitioner also contends (Br. 34-35) that, under *Morissette*, *supra*, bank robbery must be presumed to contain a mental element despite Congress's failure to provide expressly for one during the codification of the statute in 1948. That proposition is correct, but it does not lead to the conclusion that the mental element in the first paragraph of Section 2113(a) is a specific intent to steal.

In *Morissette*, 342 U.S. at 276, the Court read the offense of conversion in the federal theft statute, 18 U.S.C. 641,[26] to require proof of an intent to "deprive

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Heflin v. *United States*, 358 U.S. 415, 419 (1959), which had stated that "subsection (c) [of Section 2113] was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber." 424 U.S. at 547.

[26] As the Court's opinion reflects, the text of 18 U.S.C. 641 at that time, in pertinent part, made it an offense for anyone who "embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes

another of possession of property," despite the absence of such an element from the text of the statute. The Court reasoned that, at common law, "there are unwitting acts which constitute conversions" in the civil tort context. 342 U.S. at 270. "Had the statute applied to conversions without qualification, it would have made crimes of all unwitting, inadvertent and unintended conversions." *Ibid.*

As the Court reasoned, "It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions." 342 U.S. at 272. The Court noted that, even though the "1948 Revision was not intended to create new crimes but to recodify those then in existence," the offense of "'converts' does not appear in any of [18 U.S.C. 641's] predecessors." 342 U.S. at 269 n.28.

The Court's analysis in *Morissette* does not apply to the bank robbery statute for three reasons. First, the Court construed a common law word, "converts," and attributed to Congress the intent to include the associated mental element from the common law where Congress had not otherwise specified the elements of the crime. In the bank robbery and bank larceny offenses, however, Congress specifically used some elements from the common law and changed others. See pp. 33-34, *supra*. Second, in *Morissette* the Court emphasized the importance of the mental element in

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of any record, voucher, money, or thing of value of the United States." *Morissette*, 342 U.S. at 248 n.2.

avoiding criminalizing what otherwise would be "unwitting, inadvertent and unintended conversions." 342 U.S. at 270. That concern is not present in the bank robbery context, because the defendant's knowing use of force to take property is sufficient to demonstrate culpable conduct. See, *e.g.*, *DeLeo*, *supra*.

Third, the 1948 codification of the bank robbery statute differs in important respects from the history of Section 641. Congress's specific elimination of "feloniously" from the bank robbery section of the statute, while retaining the "intent to steal or purloin" element in the bank larceny section of the statute, showed an "affirmative instruction" to delete an intent to steal from the bank robbery statute. *Morissette*, 342 U.S. at 273. Congress is presumed to know the law when it legislates. See *Albernaz*, 450 U.S. at 341. It knew that it could follow the common law definition of robbery in the statute by simply using the word "rob" or "robbery" in defining the offense, because previous statutes using those terms had been interpreted as having incorporated the common law meaning of the offense. See *Harrison* v. *United States*, 163 U.S. 140, 142 (1896) (statute prohibiting robbery of the mails). Thus, Congress must be presumed to have understood that it was making a substantive change in the law when it deleted the term "feloniously" from the bank robbery statute.[27]

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[27] Although petitioner has not invoked it, the rule of lenity does not justify reading an "intent to steal" element into bank robbery. That rule "applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended." *Muscarello*, 524 U.S. at 138 (internal quotation marks omitted). Lenity thus requires a narrow construction of a statute when the statute contains a "grievous ambiguity or uncertainty." *Staples*, 511 U.S. at 619 n.17 (quoting *Chapman* v.

3. Petitioner's reliance (Br. 15-16) on *Neder* v. *United States*, 527 U.S. 1 (1999), is also misplaced. In *Neder*, the Court held that materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343) and bank fraud (18 U.S.C. 1344) statutes, despite the absence of an express materiality element in the text of those offenses. The Court noted that, at common law, "the well-settled meaning of 'fraud' required a misrepresentation or concealment of *material* fact." 527 U.S. at 22. The Court noted that Congress presumably intends to incorporate the meaning of common law terms in criminal statutes and that it could not infer, absent a contrary indication from Congress, that the mere omission of materiality evidenced an intent to drop that element from the fraud statutes. Finding no such contrary indication from the legislative history of the statutes, the Court concluded that materiality was an element of those fraud statutes. *Id.* at 22-23.[28]

The bank robbery statute differs in important respects from the fraud statutes in *Neder*. First, the fraud statutes used a common-law term that had an accepted meaning, and the question was whether Congress intended to incorporate that meaning into the offense; in contrast, the bank robbery statute uses a

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United States, 500 U.S. 453, 463 (1991)). In this case, however, the language and the legislative history of Section 2113(a) demonstrate that the omission of an "intent to steal" element from bank robbery was deliberate. There is no "grievous ambiguity" in Section 2113(a); thus the rule of lenity is not applicable. See *Muscarello*, 524 U.S. at 139.

[28] The Court rejected the government's arguments that materiality was not incorporated because the statutes were broader than the common law and that other fraud statutes do not contain an express materiality element. 527 U.S. at 22-23 & n.7.

combination of common-law and non-common-law terms to define the elements of the offense. Petitioner thus is forced to argue that common-law terms ("take") in Section 2113(a) incorporate other elements ("specific intent to steal") or that the additional elements found in bank larceny but not in robbery are unimportant. Second, unlike the federal fraud statutes, which omitted an express materiality element from their inception, Congress expressly deleted the "feloniously" element from the bank robbery statute in 1948. Congress' express elimination of the common law mental element from the statute demonstrates that Congress did not intend to restrict bank robbery to its common law mental element.

II. EVEN IF BANK LARCENY IS A LESSER INCLUDED OFFENSE OF BANK ROBBERY UNDER THE STATUTORY ELEMENTS TEST, THERE WAS NO ERROR IN THE CHARGE TO THE JURY

Federal Rule of Criminal Procedure 31(c) entitles a defendant to a lesser included offense instruction only if the evidence would permit a rational jury to convict him of the lesser offense while acquitting him of the greater one. *Keeble* v. *United States*, 412 U.S. 205, 208 (1973); *Stevenson* v. *United States*, 162 U.S. 313, 314-315 (1896). Thus, a factual dispute must exist as to an element of the greater offense that, if resolved in the defendant's favor, would still result in a conviction on the lesser offense. See *Sansone* v. *United States*, 380 U.S. 343, 350-351 (1965); see also 1 L. Sand et al., *Modern Federal Jury Instructions* ¶ 9.07, at 9-29. If there is no factual dispute, the court need not give a charge for the lesser included offense. See, *e.g.*, *United States* v. *Baker*, 985 F.2d 1248, 1259 (4th Cir. 1993),

cert. denied, 510 U.S. 1040 (1994); *United States* v. *Payne*, 805 F.2d 1062, 1067 (D.C. Cir. 1986). Thus, in addition to *all* of the elements of the uncharged offense being encompassed within the charged offense and to having *fewer* elements than the charged offense, the evidence must support a conviction on the lesser, but not the greater, offense charged. See *Schmuck*, 489 U.S. at 717 & n.9; *Sansone*, 380 U.S. at 350; *Berra* v. *United States*, 351 U.S. 131, 134 (1956).

In this case, the district court specifically instructed the jury on whether petitioner had taken property "by force and violence, or by intimidation":

> Now the phrase by force and violence or by intimidation used in the statute means either first, the use of actual physical strength or actual physical violence; or second, doing some act or making some statement to put someone in fear of bodily harm.
>
> The intimidation must be caused by an act knowingly and deliberately done or a statement knowingly and deliberately made by the particular defendant and that it was done in such a manner or under such circumstances that would produce such a reaction or such fear of bodily harm in a reasonable person.

J.A. 56. The court also properly denied petitioner's Rule 29 motion for acquittal, concluding that "the facts of this case are far removed from a peaceable and stealthy theft of money from this bank and I think that a reasonable jury could indeed find beyond a reasonable doubt * * * [that] the behavior of [petitioner] was such as could put a reasonable person in fear of bodily harm and that that could amount to force or intimidation such as to satisfy the third element of the bank

robbery offense." *Id.* at 32. Petitioner's contrary claim, which the district court correctly rejected, rests on the assumption that a jury could find that he obtained funds from the banks with intent to steal them—and thus was guilty of bank larceny—without also finding that he used intimidation to obtain the money. Despite petitioner's efforts in his own testimony to convince the jury that he had not used force or intimidation, see C.A. App. 180-189, the evidence showed that intimidation occurred.[29]

More importantly, as the district court properly concluded, no reasonable juror could find otherwise, as there was no evidence to suggest that the tellers handed petitioner thousands of dollars in bank money voluntarily and of their own free will, *i.e.*, without intimidation. Certainly there was no evidence that the tellers were petitioner's accomplices. Nor was there evidence that petitioner filled out a withdrawal slip or performed any other act that would cause a teller voluntarily to hand him cash. To the contrary, the evidence can support only one conclusion: petitioner gained access to the teller station and took the money

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[29] Petitioner entered the bank wearing a ski mask and several layers of clothing even though it was warm outside; he restrained a customer from leaving and pushed her back into the bank, causing her to be so terrified that she screamed and later hid in her car praying on the floor of it; he vaulted the teller counter and got so close to a teller that she yelled "that a robber was after her"; he then vaulted back over the counter and "warned that no one was to follow him." J.A. 82. Moreover, other testimony established that the tellers and customer were terrified. See, *e.g.*, C.A. App. 32 (testimony of Maria Zahn) (testifying that "I screamed out loud" because "I was scared"); *id.* at 79 (testimony of Mildred Calacal) (describing fellow bank teller Christine Sentech as "crying and trembling").

"by intimidation" within the meaning of Section 2113(a). Because no reasonable juror could reach the contrary conclusion, no bank larceny instruction was required, even if this Court were to conclude that bank larceny is a lesser included offense of bank robbery under the statutory elements test.[30]

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[30] Because the same analysis will generally apply in bank robbery prosecutions, the question whether bank larceny is a lesser included offense of bank robbery would rarely affect the trials or results in bank robbery prosecutions. Cases in which bank robbery defendants are able to present plausible evidence that the tellers willingly allowed the defendant to take money from their teller stations without intimidation are infrequent at best. It thus comes as no surprise that the vast majority of cases that even mention the issue presented in this case have upheld the trial court's refusal to give a bank larceny instruction on the ground that it is not supported by the evidence. See, *e.g.*, *United States* v. *Cornillie*, 92 F.3d 1108, 1109-1110 (11th Cir. 1996); *United States* v. *Sandles*, 80 F.3d 1145, 1147 n.1 (7th Cir. 1996); *United States* v. *Walker*, 75 F.3d 178, 180-181 (4th Cir.), cert. denied, 517 U.S. 1250 (1996); *United States* v. *Lajoie*, 942 F.2d 699, 700-701 (10th Cir.), cert. denied, 502 U.S. 919 (1991); see also *United States* v. *Perry*, 991 F.2d 304, 310-311 (6th Cir. 1993) (declining to address the appellant's contention that bank larceny is a lesser included offense because no rational jury could find that the teller handed money to the defendant voluntarily).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Federal Rule of Criminal Procedure 31(c) provides:

> **Conviction of Less Offense.** The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

2. Section 2113 of Title 18 provides:

> **Bank robbery and incidental crimes**
>
> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or

in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, including a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(h) As used in this section, the term "savings and loan association" means—

(1) a Federal savings association or State savings association (as defined in section 3(b) of

the Federal Deposit Insurance Act (12 U.S.C. 1813(b))) having accounts insured by the Federal Deposit Insurance Corporation; and

(2) a corporation described in section 3(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)(C)) that is operating under the laws of the United States.